IN THE SUPREME COURT OF WISCONSIN

NO. 97-0270

WARNER JACKSON, JENNIFER EVANS, WENDELL HARRIS, THE REVEREND ANDREW KENNEDY, RABBI ISAAC SEROTTA, CEIL ANN LIBBER, FATHER THOMAS J. MUELLER, REVEREND JOHN N. GREGG, DIANE BREWER, COLLEEN BEAMAN, MARY MORRIS, PENNY MORSE, KATHLEEN JONES and PHILIP JON

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Plaintiffs-Respondents,

v.

JOHN T. BENSON, Superintendent of Public Instruction, DEPARTMENT OF PUBLIC INSTRUCTION and JAMES E. DOYLES,

Defendants-Appellants-Petitioners,

(Caption continued . . .)

BRIEF *AMICUS CURIAE* OF CENTER FOR EDUCATION REFORM, AMERICAN LEGISLATIVE EXCHANGE, CEO AMERICA, CEO CENTRAL FLORIDA, CEO CONNECTICUT, PUTTING CHILDREN FIRST, JAMES MADISON INSTITUTE FOR PUBLIC POLICY STUDIES, JEWISH POLICY CENTER, "I HAVE A DREAM" FOUNDATION (WASHINGTON, D.C. CHAPTER), INSTITUTE FOR PUBLIC AFFAIRS, LIBERTY COUNSEL, MAINE SCHOOL CHOICE COALITION, PENNSYLVANIA MANUFACTURERS ASSOCIATION, REACH ALLIANCE, ARKANSAS POLICY FOUNDATION, NORTH CAROLINA EDUCATION REFORM FOUNDATION, TEXAS JUSTICE FOUNDATION, MINNESOTA BUSINESS PARTNERSHIP, MINNESOTANS FOR SCHOOL CHOICE,
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Plaintiffs-Respondents,

v.

**JOHN T. BENSON, Superintendent
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Defendants-Appellants-Petitioners,

and

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v.

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Defendant-Appellant.

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INTEREST OF *AMICI CURIAE*

The Center for Education Reform ("CER") is an independent non-profit organization founded in 1993 to advance substantive reforms in public education. CER works to ensure that ideas critical to education reform are identified, understood and implemented. CER works with diverse constituencies to implement reforms that improve access, accountability and assessment, and that help restore excellence and equity to America's public schools. CER believes that this case is of national importance and that the decision of this Court may be followed closely by courts and legislatures throughout the United States.

Other *Amici*, American Legislative Exchange, CEO America, CEO Central Florida, CEO Connecticut, Putting Children First, James Madison Institute for Public Policy Studies, Jewish Policy Center, "I Have a Dream" Foundation (Washington, D.C. Chapter), Institute for Public Affairs, Liberty Counsel, Maine School Choice Coalition, Pennsylvania Manufacturers Association, Reach Alliance, Arkansas Policy Foundation, North Carolina Education Reform Foundation, Texas Justice Foundation, Minnesota Business Partnership, Minnesotans for School Choice, TOUSSAINT Institute, South Carolina Policy Council, and United New Yorkers for Choice in Education, support this brief in the belief that school choice promotes equal opportunity in education for children and will generally improve education in the United States. A description of these *Amici* is contained in the Motion to File Amicus Brief in Support of Defendants-Appellants-Petitioners attached hereto.

Amici are all vitally interested in promoting the best possible education for America's children by enabling parents to choose from a wide variety of educational alternatives, including high quality sectarian schools.

INTRODUCTION

The education of our children is perhaps the most vital issue we face as a nation. The State of Wisconsin and the nation as a whole have a duty to promote quality education for all children. Indeed, while education has proven to be the tool for upward mobility in the United States, quality education remains unattainable for many.

The Wisconsin legislature made a bold determination to empower parents when it passed Wish. Stat. Sec. 119.23, the Milwaukee Parental Choice Program ("Parental Choice Program"), and when it amended the Parental Choice Program to include religiously-sponsored schools. 1995 Wish. Act 27, Sec. 4002-4009. The legislature provided vouchers to a limited number of children from low-income families, allowing them access to the education they would not have otherwise been able to receive, and thus a chance to choose a better future. In the Parental Choice Program, the State neutrally provides a voucher to parents who then choose where to send their children to school. Thus, the amended Parental Choice Program is fully consistent with the State and Federal Constitutions because the State takes no action to benefit religion.

Amici agree with the briefs filed in support of the Defendants-Appellants, and will not duplicate those arguments here. The purpose of this brief is to provide a legal framework which demonstrates the constitutionality of the amended Parental Choice Program, followed by empirical data which further demonstrates that the amended Parental Choice Program has the secular primary effect of advancing learning and achievement for all students.

. THE AMENDED PARENTAL CHOICE PROGRAM DOES NOT VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION OR ARTICLE 1, SECTION 18 OF THE WISCONSIN CONSTITUTION.

The amended Parental Choice Program does not violate the Establishment Clause. Although the amended Parental Choice Program allows *parents* to use vouchers at religious schools, it does not involve any *state* action other than providing vouchers to parents. *Parental choice* insulates the Parental Choice Program from any possibility of state action advancing religion.

The U.S. Supreme Court has adopted a three-prong test for applying the Establishment Clause to legislation: (1) the statute must have a secular purpose; (2) its principle or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster excessive governmental entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

> The U.S. Supreme Court consistently has upheld programs analogous to the amended Parental Choice Program on grounds that the programs provided benefits to individual citizens who themselves made the choice of where to "spend" their benefits. Thus, if citizens chose to use benefits at religious institutions, they did so without conferring any government imprimatur on the institution, and without requiring the government to employ entangling monitoring measures to regulate how the benefits were used. See Agostini v. Felton, 117 S.Ct. 1997 (1997), Zobrest v. Catalina Foothills Sch. Dist., 509

U.S. 1 (1993); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983). Agostini, Zobrest, Witters and Mueller control this case.

In Zobrest, parents sought a sign language interpreter under a state program for their deaf son, even though he attended a religious school. The school district refused, claiming that this would constitute direct aid to a pervasively sectarian institution and excessively entangle the district with religion because its employee -- the sign language interpreter -- would be on the school premises, interpreting religious as well as secular statements. The Supreme Court rejected this argument, first, recognizing that there is no *per SE* bar against public assistance to religious schools. Zobrest, 509 U.S. at 8. Second, the Court held that such assistance, generally available to all other families with disabled students, directly benefited the parent or student, not the religious school. Id. at 9. The Court concluded:

The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying [under the act], without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents.

Id. at 10.

Likewise, in Mueller v. Allen, 463 U.S. 388 (1983), the U.S. Supreme Court upheld Minnesota's statute allowing parents an income tax deduction for certain educational expenses, even if the child attends a religious school. Since this benefit was generally available to parents who independently chose how to use it, the Minnesota plan did not have the primary effect of advancing religion. Id. at 399. As the Court stated:

Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of State approval" can be deemed to have been conferred on any particular religion, or on religion generally.

Id. (citing Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

Indeed, neutrally-available state aid cannot be withheld from beneficiaries simply because the recipient intends to use it at a religious school. In Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986), the U.S. Supreme Court held that the State of Washington could not withhold vocational assistance from a qualified beneficiary simply because he intended to use the benefit at a Bible school. The Court rejected the notion that this was a "direct subsidy" of the Bible school or an endorsement of religious activity simply because *the student* chose the Bible school over other public institutions. Id. at 487. Significantly, it was the student's ability to independently choose where to attend school that persuaded the Court that there would be no direct aid to religious institutions. As the Court held, the aid ultimately flowing to the Bible

school did so "only as a result of the genuinely independent and private choices of aid recipients." Id.

This Court has likewise held that indirect benefits to religious schools do not violate the Establishment Clause. In State ex rel. Warren v. Nusbaum, ("Nusbaum II"), 64 Wis. 2d 314, 219 N.W.2d 577 (1974), the Court upheld a local school district's purchase from a religious school of special education services for handicapped students within its district. The Nusbaum II Court held that the program, a direct rendering of state funds to a religious school, was valid under the Lemon test. Id. at 328, 219 N.W.2d at 585. The Court also concluded that providing educational services -- even in a religious school -- advanced a primarily secular effect and that incidental benefits to religious organizations should not be construed as the "advancement" of religion. Id.

The critical element underlying the decisions in Zobrest, Witters and Mueller is that the government benefit flowed to the recipient, who then decided independently of the government where the benefit would be spent. Last term, the Supreme Court elevated this factor in a way especially relevant here:

Even though the [Witters] grant recipient clearly would use the money to obtain religious education, . . . the tuition grants were made available generally without regard to the sectarian-non-sectarian, or public-nonpublic nature of the institution benefitted.

Agostini v. Felton,117 S.Ct. 1997, 2011 (1997) (upholding use of Title I funds on parochial school property as a neutral benefit provided to students) (internal quotes and citations omitted). As the Court put it, "[t]he grants were disbursed directly to students, who then used the money to pay for tuition at the educational institution of their choice." Id. The Court found this "no different from a state's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of individuals.'" Id. at 2011-12.

Likewise, the whole point of the amended Parental Choice Program is to provide *parental choice*, accomplishing the same degree of independent decision-making that the Supreme Court found essential to the validity of programs upheld in Zobrest, Witters and Mueller. Under the amended Parental Choice Program, the state benefit (school tuition voucher) goes to the individual (parent), and not to the church-run school. It is the citizen who has the right to choose whether the

benefit will be spent at a religious or non-religious school, or whether to use or decline the benefit at all. The amended Parental Choice Program does not provide direct aid to a religious school, but rather direct aid to parents and their children. It provides only a "shadow of incidental benefit to a church-related institution" (Nusbaum II, 64 Wis. 2d at 328, 219 N.W.2d at 585) -- if, and only if, parents choose a *sectarian* private school for their children. In the words of the Supreme Court, any money that ultimately goes to a religious institution will do so "only as a result of the genuinely independent and private choices of individuals." Agostini, 117 S.Ct. at 2011-12 (internal quotes omitted).

The inclusion of religious groups in a governmental program like Wisconsin's school choice program is not unique. There are many state and federally operated programs that put cash and other benefits into the hands of eligible recipients who are then free to spend them wherever they wish. See Id. at 2014 (citing examples of sustained programs providing aid to children regardless of what school they attended). For example, a veteran may use federal funds to attend a religious school (or seminary) under the "G.I. Bill." 38 U.S.C. Sec. 1651. The religious school is not the "recipient" of federal funds; the individual simply chooses to use his voucher at that school. Similarly, Congress' recent welfare reform law includes a "charitable choice" provision (42 U.S.C. Sec. 604a) which allows welfare recipients to use their voucher for services at religiously-affiliated charities and even churches. Allowing religious groups to participate does not alter the fact that the federal assistance flows to the aid recipient and not to the religious organization -- in fact, *no* benefit will flow to religious groups if all the recipients choose secular charities. Low-income beneficiaries may choose to use federal rent and housing vouchers at housing complexes operated by religious charities, and there are no restrictions on food stamps under programs like AFDC to prevent the recipient from purchasing foods which have religious significance or which are sold by religious suppliers, such as kosher food. 7 U.S.C. Sec. 2019. The Medicare and Medicaid programs provide reimbursement for health care administered to eligible individuals by qualified providers, even if the provider is owned and operated by a religious group. 42 U.S.C. Secs. 1395, 1396. Both programs allow *patients* to choose the health care provider. Certain students already receive benefits from the government, such as school meals and transportation, although they attend religious schools. 42 U.S.C. Sec. 1755. Students do not forfeit the benefits they are entitled to simply because they choose to attend a religious school. Of course, donors may take charitable deductions on income tax filings for contributions to charities that are operated by religious groups and secular groups alike. 26 U.S.C. Sec. 170.

One cannot ignore the role that religious organizations play in delivering critical services and programs paid for by government. To hold that all of these programs, including the similar Wisconsin choice program, should now be excluded turns the law

on its head. As the Supreme Court held in Rosenberger v. Rector and Visitors of the University of Virginia, 115 S.Ct. 2510, 2523 (1995):

> If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religious-neutral program, used by a group for sectarian purposes, then Widmar, Mergens, and Lamb's Chapel would have to be overruled.

. THE PRIMARY EFFECT OF THE AMENDED PARENTAL CHOICE PRO GRAM IS TO ADVANCE A VITAL PUBLIC PURPOSE, NAMELY, ACCESS TO EDUCATION

The primary effect of the amended Parental Choice Program is to advance the state's critical objective of providing quality education to its children. This is supported by research relating to school choice and private school achievement. Wisconsin, recognizing the need to improve the quality of the education received in the State, may create a general, secular school choice program for parents and students. To open school choice to all schools, including religious ones, only effectively furthers the State's goal of providing better educational opportunities.

. Public Education Is In Crisis In The United States And Needs Systemic Reform.

It is axiomatic that quality education is the essential element to success in our society. Yet the sobering fact is that the American education system is failing our children, particularly the most vulnerable, the disempowered and the poor. For example, a 1991 report by the International Assessment of Educational Progress ranked American 13 year-olds as 12th out of 14 industrialized countries in math and science, with a steady decline of SAT scores over the 25 leading up to the study. D. McGroarty, Break These Chains: The Battle for School Choice 17 (1996).

The impact of these deficiencies and declines has been greatest in urban areas. In New York City, for instance, only 25% of all public high school students graduate. S. Stern, "The Invisible Miracle of Catholic Schools," City Journal at 16 (Summer 1996). In Cleveland, only 17% of 12th graders pass the State's reading proficiency test. "Not Making the Grade," The Plain Dealer at 2C, April 28, 1996. Minority and poor students suffer disproportionately hard in the urban setting. The 1994 National Assessment of Educational Progress ("NAEP") conducted by the U.S. Department of Education revealed that African-American and Hispanic children tested substantially lower than white students in every grade. P. Williams, et al., NAEP 1994: A First Look 10 (1995). The NAEP offered the startling finding that African-American 12th graders were less proficient in reading skills than the average 8th grade white student. Id.

However, these statistics are even more striking when compared to private school statistics within the same urban setting, serving students with the same demographics. In 1990 the RAND Corporation undertook an extensive study comparing public school students and Catholic school students in New York City. The study found that 95% of Catholic school students graduate from high school and 75% of Catholic school students took the SAT. The average Catholic school student scored 173 points higher than the average public school student (only 16% of public school students sat for the SAT in 1990). Stern at 16. See also D. Neal, "The Effects of Catholic Secondary Schooling on Educational Achievement," Vol. 15 Journal of Labor Economics 98 (1997) (the greatest statistical difference in achievement is between public schools in urban, minority communities and Catholic schools in those same communities).

Clearly there is a qualitative difference between public and private schools. Without school choice, the most disadvantaged in our society, particularly in urban areas, have no option but to attend schools that cannot prepare them for the next century.

. **School Choice -- Including A Parent's Choice Of Religious Schools -- Offers One Solution To The Current Education Crisis.**

The amended Parental Choice Program offers a bold initiative: access to private schools -- including successful parochial schools -- for the poorest students in Milwaukee. Like Milwaukee, numerous other states and communities have recognized the need for systemic education reform by adopting a variety of school choice programs. Currently, 19 states permit public school choice

throughout the state and 29 states and the District of Columbia offer charter schools. "Selected Reforms At-A-Glance," The Center for Education Reform (January 1997 Press Release). Over the past decade private individuals and organizations have taken up the slack where government has failed. Extensive private sector scholarships for low-income students have been established in a host of urban settings and have met with amazing success for the children. The "I Have A Dream" Foundation is one such success. Through the Foundation, its founder, Charles Benenson, "adopted" several classes at P.S. 44 in the South Bronx of New York City. Benenson offered to pay the full tuition for any 8th grader who wished to attend a Catholic high school. Of the 60 eligible 8th graders in his first adopted class, 22 accepted Benenson's offer and 20 of the 22 attended college after graduation. Of the 38 who chose to stay in the public school system, only two went on to college. Stern at 16. As Benenson observed:

> They were the same kids from the same families and the same housing projects. In fact, sometimes one child went to public school and a sibling went to Catholic school. We even gave money to the public-school kids for tutoring and after-school programs. It's just that the Catholic schools worked, and the others didn't.

Id. at 16-17. In the case of students from P.S. 44, school choice worked. Unfortunately, in Wisconsin various interest groups have deterred real systemic reform. As former U.S. Education Secretary William Bennett remarked in Milwaukee in the Fall of 1996 while discussing this case, "This battle isn't about the Constitution. It's about power. The unions refuse to cede control over education of children to their parents." "School Wars," Wall Street Journal at A20, September 11, 1995. Until now it has fallen to generous individuals and charitable organizations to provide options for poor students. These individuals have stood bravely against the status quo of public school monopolies. Unfortunately, "a full blown education program can't continue on charitable donations." Id.

> The original Parental Choice Program has provided important data to demonstrate that school choice works, that access to quality education improves achievement levels of students when compared to children in similarly situated environments. Researchers from the University of Houston and Harvard University's Program on Education Policy and Governance examined students involved in the Parental Choice Program experiment and in September, 1996 reported that "students enrolled in choice schools for three or more years substantially outperformed, on average, a comparable group of students attending

Milwaukee public schools." J. Greene, et al., "The Effectiveness of School Choice in Milwaukee," Madison Review, Fall 1996 at 5. Their conclusion was that the Parental Choice Program worked in Milwaukee despite its limitations:

[D]espite these restrictions and limitations, data derived from a natural experiment that allocated students randomly to test and control groups suggests that students in choice schools, in their third and fourth years, scored, on average, higher in both reading and mathematics than a randomly selected control group. The differences in educational achievement are not trivial. A difference of eight points wipes out half the observed difference between the performance of whites and minorities on nationally standardized tests. If even this limited choice program has the capacity to make such an extraordinary contribution to equal educational opportunity, more extensive choice plans deserve far more serious consideration than they have generally received.

Id. See also C. E. Rouse, Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program (September 1997) (students participating in the MPCP generally scored up to 2-3 percentile points per year in math more than comparative public school students). The amended Parental Choice Program serves the vital public purpose of opening the doors of quality education to those for whom the doors are shut. It is a neutral, secular benefit provided to fulfill one of this State's highest responsibilities to its residents -- opportunity through education.

CONCLUSION

The amended Parental Choice Program does not provide a benefit to religion; it principally provides a benefit to children and their families. The amended Parental Choice Program does not compel taxpayers to support a religious institution; it compels taxpayers to support a child's education. Like the original Parental Choice Program, the amended Parental Choice Program advances education. This Court should reverse the decision of the circuit court and hold the amended Parental Choice Program constitutional under both state and federal law.

Dated: December 19, 1997.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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I certify that three (3) true and accurate copies of the foregoing **BRIEF *AMICUS CURIAE* OF CENTER FOR EDUCATION REFORM, AMERICAN LEGISLATIVE EXCHANGE, CEO AMERICA, CEO CENTRAL FLORIDA, CEO CONNECTICUT, PUTTING CHILDREN FIRST, JAMES MADISON INSTITUTE FOR PUBLIC POLICY STUDIES, JEWISH POLICY CENTER, "I HAVE A DREAM" FOUNDATION (WASHINGTON, D.C. CHAPTER), INSTITUTE FOR PUBLIC AFFAIRS, LIBERTY COUNSEL, MAINE SCHOOL CHOICE COALITION, PENNSYLVANIA MANUFACTURERS ASSOCIATION, REACH ALLIANCE, ARKANSAS POLICY FOUNDATION, NORTH CAROLINA EDUCATION REFORM FOUNDATION, TEXAS JUSTICE FOUNDATION, MINNESOTA BUSINESS PARTNERSHIP, MINNESOTANS FOR SCHOOL CHOICE, TOUSSAINT INSTITUTE, SOUTH CAROLINA POLICY COUNSEL, AND UNITED NEW YORKERS FOR CHOICE IN EDUCATION IN SUPPORT OF DEFENDANTS-APPELLANTS-PETITIONERS** were served on the counsel of record for each of the parties indicated below by an * and one (1) copy was served on each of the other counsel of record in accordance with Section 809.19(8) by First-Class U.S. Mail, postage pre-paid this 19th day of December, 1997:

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